No. 89-1606

In the Supreme Court of the United States

OCTOBER TERM, 1989

MODEL MAGAZINE DISTRIBUTORS, INC., CROSS-PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly upheld the denial of a motion to quash a grand jury subpoena for corporate business records, after concluding that the subpoenaed records were relevant in that they would "most likely reveal whether [cross-petitioner's] business dealings in Virginia resulted in the sale and or distribution of allegedly obscene materials in the state."

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-15a) is reported at 884 F.2d 772.[1] Earlier opinions of the court of appeals (Pet. App. 16a-18a, and 19a-56a) are reported, respectively, at 844 F.2d 202, and 829 F.2d 1291.

JURISDICTION

The judgment of the court of appeals was entered on August 31, 1989. A petition for rehearing was denied on December 12, 1989 (Pet. App. 68a-69a). The government's petition for a writ of certiorari was filed on March 12, 1990,

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[1] References to "Pet. App." are to the appendix to the government's petition for a writ of certiorari in *United States* v. *R. Enterprises, Inc., and MFR Court Street Books, Inc.*, No. 89-1436.

and was served on March 14, 1990. The cross-petition was filed on April 13, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Since 1986, a grand jury sitting in the Eastern District of Virginia has been investigating allegations of interstate transportation of obscene materials. In early 1988, the grand jury issued a series of subpoenas to cross-petitioner Model Magazine Distributors, Inc. (Model), and two related companies, R. Enterprises, Inc., and MFR Court Street Books, Inc. (MFR).[2] The subpoenas sought a variety of corporate books and records. See Pet. App. 3a, 70a-82a. The grand jury subsequently issued two further subpoenas to Model. The first called for additional business records; the second requested one copy of each of 193 identified videotapes that Model had shipped into the Eastern District of Virginia. *Id.* at 83a-84a; see *id.* at 4a.

2. The companies moved to quash the subpoenas. Following extensive hearings in the United States District Court for the Eastern District of Virginia, the motions to quash were denied.

First, on June 17, 1988, Judge Hilton denied Model's motions to quash. Pet. App. 57a-58a. The court found that the two subpoenas for business records were sufficiently specific. *Ibid.* It also upheld the subpoena for the 193 videotapes, concluding that the tapes were relevant to the government's investigation and that production of the tapes would not constitute a prior restraint. *Ibid.*

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[2] The government had earlier sought to subpoena certain corporate records and videotapes in the possession of Model and another company, but the court of appeals had held those subpoenas to be too broad and too vague, and had refused to compel compliance with the subpoenas. See Pet. App. 19a-56a.

Second, on July 8, 1988, Judge Cacheris denied the motion by R. Enterprises to quash the subpoena for business records. Pet. App. 59a-60a. The court found that the subpoena was "clearly delineated and not overly burdensome." *Id.* at 59a. The court also found a "sufficient connection" between R. Enterprises and the Eastern District of Virginia to warrant "further investigation by the grand jury." *Id.* at 60a. In particular, the court noted that Martin Rothstein, the owner of R. Enterprises, had admitted that R. Enterprises, MFR Books, and Model were "all the same thing." *Ibid.*

Finally, on August 12, 1988, Judge Ellis denied MFR's motion to quash the subpoena for business records. Pet. App. 61a-64a. The court stated that it was "inclined to agree" with "the majority of the jurisdictions," which do not require the government to make "a threshold showing" before a grand jury subpoena may be enforced. *Id.* at 63a. The court added, however, that "even assuming that the Fourth Circuit would require a threshold showing of relevance," the government had made such a showing in this case. *Ibid.* The court found sufficient evidence that respondents were "related entities," at least one of which "certainly did ship sexually explicit material into the Commonwealth of Virginia." *Ibid.* The court also found the subpoena to be appropriately "tailored." *Ibid.* Characterizing the subpoenas in this case as "fairly standard business subpoenas," which "ought to be complied with," *id.* at 65a, the district court denied the motion to quash. When the companies thereafter refused to comply, the court found them in contempt. *Id.* at 64a.

3. The court of appeals affirmed in part and reversed in part. Pet. App. 1a-15a. Relying on *United States* v. *Nixon*, 418 U.S. 683 (1974), the court held that, pursuant to Rule 17(c) of the Federal Rules of Criminal Procedure, the government must "clear three hurdles" in order to secure

the enforcement of a grand jury subpoena: (1) relevancy; (2) admissibility; and (3) specificity. Pet. App. 7a.[3] The court emphasized that unless grand jury subpoenas are held to such a threshold standard, they might be used as "a means of discovery in addition to that provided by Fed. R. Crim. Pro. 16." *Id.* at 9a. "The test for enforcement," the court explained, "is whether the subpoena constitutes 'a good faith effort to obtain identified evidence rather than a general "fishing expedition" that attempts to use the rule as a discovery device.' " *Ibid.* In order not to "undercut[ ] the strict limitation of discovery in criminal cases," *ibid.*, the court held that "any documents subpoenaed under Rule 17(c) must be admissible as evidence at trial." *Id.* at 10a.

Applying those standards, the court first upheld the subpoenas to Model for business records. Pet. App. 7a-8a. It found the requested records to be sufficiently relevant because they would "most likely reveal whether the company's business dealings in Virginia resulted in the sale and or distribution of allegedly obscene materials in the state." *Id.* at 8a. In addition, the court had no doubt of "the necessity of a subpoena to obtain those records, as logically they are available only from the company itself." *Ibid.*

The court, however, quashed the subpoenas for the business records of MFR and R. Enterprises. Pet. App. 8a-10a. The court explained that the government had adduced no evidence that those companies had done business in the Eastern District of Virginia; the court therefore "fail[ed] to see how the records of those companies are relevant to a grand jury investigation" in the district. *Id.* at 9a. In addition, the court stated, any evidence of activities by

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[3] The court of appeals recognized that the *Nixon* Court was not reviewing a subpoena duces tecum in connection with a grand jury investigation, but it found the interpretation of Rule 17(c) articulated in the *Nixon* case "equally applicable in this case." Pet. App. 7a n.2.

the target companies outside the State of Virginia "would most likely be inadmissible on relevancy grounds at any trial that might occur." *Id.* at 10a. Accordingly, the court held, the subpoenas "fail to meet the requirement[ ] that any documents subpoenaed under Rule 17(c) must be admissible as evidence at trial." *Ibid.*

Finally, the court remanded Model's motion to quash the subpoena for videotapes. Pet. App. 10a-15a. The court held that the subpoenaed films were not shown to be obscene and that the government had failed to establish the relevance of the films to the grand jury's investigation. *Id.* at 12a-14a & n.4. It also noted that there were "additional means for obtaining these tapes other than the issuance of a subpoena duces tecum and an *in camera* review by the district court." *Id.* at 13a.

ARGUMENT

Cross-petitioner contends that, as "a wholesale distributor of adult magazines, paperback books, and video tapes" (Pet. 3), it was entitled to "stringent" (Pet. 9) protection against grand jury subpoenas for its corporate books and records. In particular, cross-petitioner asserts, "some showing of relevance must be made before such a massive demand for documents is authorized." *Ibid.* Cross-petitioner contends that "once a subpoena is challenged because the records sought are unrelated to the grand jury investigation, the Government is obliged to illustrate how those records are connected to the inquiry." *Id.* at 12.

In fact, however, cross-petitioner has no real disagreement with the legal standard applied by the court of appeals. Indeed, cross-petitioner was the beneficiary of a legal standard even more generous than the one it now seeks, yet it nevertheless lost its motion to quash. In denying Model's motion to quash the subpoena for corporate records, the

court below held that "documents subpoenaed under Rule 17(c) must be admissible as evidence at trial" (Pet. App. 10a), and not merely relevant to a grand jury investigation. The court of appeals reasoned that unless grand jury subpoenas are held to such a strict threshold standard, they might be used as "a means of discovery in addition to that provided by Fed. R. Crim. Pro. 16." Pet. App. 9a. Applying those standards, the court nonetheless upheld the subpoenas to Model for business records. *Id.* at 7a-8a. It found the requested records to be sufficiently relevant because they would "most likely reveal whether the company's business dealings in Virginia resulted in the sale and or distribution of allegedly obscene materials in the state." *Id.* at 8a.[4] In addition, the court had no doubt of "the necessity of a subpoena to obtain those records, as logically they are available only from the company itself." *Ibid.*

In our petition in No. 89-1436, we have contended that the court of appeals' decision—requiring that documents subpoenaed by a grand jury be relevant and admissible at trial—is mistaken.[5] But whatever the disposition of our

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[4] In light of the court of appeals' conclusion, there is no basis for cross-petitioner's complaint that the government was not required to show how the subpoenaed records "are relevant to a grand jury investigation in Virginia" (Pet. 15).

[5] Cross-petitioner relies on First Amendment principles in defending a "stringent" relevance standard for grand jury subpoenas. Cross-petitioner does not, however, explain why the First Amendment provides any protection to routine corporate records (as opposed to the actual videotapes). Although cross-petitioner asserts that the subpoena "will effectively inhibit any future distribution of all copies of books and video-tapes" (Pet. 14), it offers no support for that prediction. And "[b]are allegations of possible first amendment violations are insufficient to justify judicial intervention into a pending investigation." *Dole v. Milonas*, 889 F.2d 885, 891 (9th Cir. 1989).

In any event, even if the First Amendment were applicable to Model's corporate books and records, it would not insulate cross-petitioner from

petition, there is no reason to grant Model's cross-petition. Model benefited from a highly "stringent" (Pet. 9) standard of relevance, and it nonetheless lost its motion. Thus, Model's quarrel is not with the legal standard adopted by the court below, but rather with that court's application of the standard to the subpoenas for Model's corporate books and records. That fact-bound decision warrants no further review.

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the duty to respond to a grand jury subpoena. As this Court explained in *Branzburg* v. *Hayes*, 408 U.S. 665, 682 (1972), "the First Amendment does not invalidate every incidental burdening of the press that may result from the enforcement of civil or criminal statutes of general applicability." Applying that principle, the Court in *Branzburg* held that the First Amendment does not shield a reporter from having to answer a grand jury's questions concerning an ongoing criminal investigation. See also *Herbert* v. *Lando*, 441 U.S. 153 (1979) (no special exemption for the media from the general rules of pretrial discovery); *Zurcher* v. *Stanford Daily*, 436 U.S. 547 (1978) (no special immunity for the press from search warrants); *SEC* v. *McGoff*, 647 F.2d 185 (D.C. Cir.) (upholding subpoena issued by the Securities and Exchange Commission for corporate records relating to transactions with South Africa), cert. denied, 452 U.S. 963 (1981); *In re Grand Jury Matter (Gronowicz)*, 764 F.2d 983, 989 (3d Cir. 1985) (Garth, J., concurring), cert. denied, 474 U.S. 1055 (1986).

CONCLUSION

The cross-petition for a writ of certiorari should be denied.

Respectfully submitted.

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